Supreme Court, U.S.
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No. 84-1677

In The

Supreme Court of the United States

October Term, 1984

—o—

In re Corrugated Container Antitrust Litigation

—o—

GREEN BAY PACKAGING INC.,
Petitioner,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

—o—

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

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INTRODUCTION

The significance of the Seventh Amendment issue presented by Green Bay's Petition is apparent from plaintiffs' candid statement that "the proceedings in the district court are more aptly characterized as seeking specific performance of an obligation to pay a contractually stipulated sum, and not as a simple claim for money damages." Brief in Opposition at 12 n. 9. This statement, together with the unsupportable position that this case involves a consent decree, demonstrates that plaintiffs actually seek an injunction to pay a debt. Therefore, the significance of this case goes well beyond the fact that plaintiffs' seek to avoid the rule that equity does not intervene where an adequate remedy at law exists. Ultimately, it is important because the plaintiffs, in seeking to deprive Green Bay of a jury trial, would have this Court affirm the expedient adopted by the court of appeals of defining an action at law to collect on a promissory note as one in equity, a course that this Court has repeatedly rejected in the past. *Scott v. Neely,* 140 U.S. 106, 110 (1891) ("In the federal courts this right [to a jury trial] cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by blending any claim, properly cognizable at law, as a demand for equitable relief in and of the legal action or during its pendency.")

I. The Plaintiffs Are Attempting to Enforce a Settlement Contract for the Payment of a Debt, Not a Consent Decree

Plaintiffs devote much of their Brief in Opposition to depicting the proceeding below as a court enforcing a consent decree it had earlier entered, and remind the

Court of cases holding that there is no right to trial jury in contempt proceedings for violation of an injunction. Petitioner, it is said "totally misconceives the nature of the proceeding below." Brief in Opposition at 11-12.

This is a remarkable rewriting of history. No party or court ever had the slightest thought that a "consent decree" was involved here until the Fifth Circuit, in the decision of which review is now sought, *sua sponte* so characterized it. *In Re Corrugated,* 752 F.2d 137, 139, 142 (5th Cir. 1985). There is nothing that could possibly be regarded as an injunctive order, within the requirements of Fed. R. Civ. P. 65(d). Compare, for example, the proposed consent decree in *Carson v. American Brands, Inc.,* 450 U.S. 79, 85 n.9 (1981). In the imaginary circumstances depicted by plaintiffs, there might well be no right to trial by jury. But there is a right to a trial by jury when, as here, in reality plaintiffs are seeking to collect on a promissory note subject to the terms of an ambiguous settlement agreement. Such a claim is legal, not equitable. *Scott v. Neely,* 140 U.S. 106, 110 (1981). This is plain from the terms of the Settlement Agreement, the attached Promissory Note, Petitioner's Appendix at D-1, and the Final Judgment, Supplemental Appendix A-1, as well as from the treatment these documents have received from the parties and courts below.

The Settlement Agreement contains terms typical of a negotiated contract. In return for the dismissal of a lawsuit, Green Bay agreed to pay an amount of money "subject to" the various terms and conditions set forth in the document, including the Favored Nations Clause. The terms of the contract preclude modification by the

court absent the parties' express agreement. In approving the Settlement Agreement, the district court found that "all of the conditions or events required by the settlement to be satisfied have been satisfied or have occurred," thus confirming that the Clause remained an integral part of the contract at the time of final approval. The Final Judgment [Supplemental Appendix A-1 attached hereto] also confirms that the issues arise out of the parties' ambiguous settlement contract, as it specifically refers to and its entry was dependent upon the parties' settlement. It contains no language implementing the Settlement Agreement or ordering compliance with it, nor could it have, since subsequent lower settlements remained a possibility after the Final Judgment was entered. Even the language in the Final Judgment reserving jurisdiction over Green Bay and the settlement Fund is not injunctive in character: at most it reserved the possibility that at some future time the district court might be requested to do something in MDL 310.

The treatment of these documents by the lower courts during the past five years further confirms that they are not, individually or collectively, a consent decree. Since they contain no injunctive relief they cannot be decrees in the traditional sense, a fact that is obvious when Green Bay's settlement contract is compared to the plaintiffs' settlement with, for example, the defendant Alton Box Board Company, which consisted of a Settlement Agreement and a separate Consent Decree. See Supplemental Appendix B-1 at B-13. In preliminarily approving the settlements, the district court acknowledged that it was approving settlement agreements. Its discussion of the agreements nowhere suggests that they were viewed

by anyone as consent decrees. *In Re Corrugated,* 1979-1 Trade Cases (CCH) ¶ 62,690 (S.D. Tex. 1979). When it finally approved the settlement agreements in December 1979, the district court once again confined its inquiry to the adequacy and fairness of the settlements pursuant to its obligations under Fed. R. Civ. P. 23(e). It did not refer to the settlements as consent decrees. See, e.g., *In Re Corrguated,* 1980-1 Trade Cases (CCH) ¶ 63,163 (S.D. Tex. 1979). Nor did the Court of Appeals for the Fifth Circuit indicate it was reviewing consent decrees when the district court's final approval was first appealed.[1] In fact, the court of appeals itself indicated that "[t]he district court's most important function in reviewing compromises of class actions is its consideration of the settlement terms." *In Re Corrugated,* 643 F.2d 195, 212 (5th Cir. 1981). Upon remand for additional findings, the district court engaged in a defendant-by-defendant analysis of the settlement agreements, again confining its discussions to the agreements. *In Re Corrugated,* 1981-2 Trade Cases (CCH) ¶ 64,114 (S.C. Tex. 1981). Upon subsequent appeal, the district court was affirmed without any reference to consent decrees. *In Re Corrugated,* 659 F.2d 1322 (5th Cir. 1981).

Although the plaintiffs attempted to enforce their version of the Settlement Agreement by an Order to Show Cause and two motions for summary judgment, even they

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[1]In another case, the court of appeals recognized the distinction between class action settlement agreements for the payment of money, which are merely "ratified" by the district court, under Rule 23(e), and consent decrees containing injunctive provisions which "require more careful scrutiny." *United States v. City of Miami, Florida,* 664 F.2d 435, 441 (5th Cir. 1981).

have never requested an order enforcing a consent decree. The Order to Show Cause concerns only the Settlement Agreement and the Favored Nations Clause and makes no mention of a consent decree. The plaintiffs' subsequent motions for summary judgment are likewise devoid of reference to consent decrees. The first, captioned "Plaintiffs' Motion to Compel Defendant Green Bay Packaging Inc. to Comply with the Terms of its Settlement Agreement," seeks relief based upon the Settlement Agreement and nothing else. The second, entitled "Plaintiffs' Amended Motion to Compel Green Bay Packaging, Inc. to Comply With the Terms of Its Settlement Agreement", is also plainly directed toward enforcing the terms of the Settlement Agreement and makes no reference to consent decrees. It is therefore not surprising that the district court, in summarily granting the plaintiffs' motion, granted plaintiffs the relief requested—enforcement of the Settlement Agreement—without any mention of a consent decree.

Finally, in the subsequent appeal, the parties not once alluded to a consent decree. Instead, plaintiffs maintained that the district court merely enforced the Settlement Agreement to pay the Promissory Note. In short, without urging by any party, the court of appeals, *sua sponte*, imported to this litigation a concept not contemplated by the parties or the district court and totally inapposite to the substance of the parties' agreement.[2]

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[2]The plaintiffs in their response brief have picked up on the consent decree language used by the court of appeals. To the extent that this distinction underlies the result in the

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No matter what label is applied to the Settlement Agreement, Promissory Note and Final Judgment, it is clear that their content is simply inconsistent with the concept of a consent decree. Historically, decrees, including consent decrees, were issued by courts of equity, while judgments were rendered by courts of law. With the merger of law and equity, the Federal Rules provided that a "decree" may be called a "judgment," Fed. R. Civ. P. 54(a). However, the use of the term "judgment" to describe what was historically called a "decree" does not diminish the substantive distinction between a judgment granting a money award for which the right to a jury trial exists and a judgment granting an injunction for which it does not.

That consent decrees are essentially voluntary restraints in the nature of equitable (usually injunctive) relief is plain from the fact that *every* consent decree case cited by plaintiffs involves equitable relief of one form or another. Yet no injunctive relief is granted in the Final Judgment and none is found in the Settlement Agreement. Since the dispute concerns how much money Green Bay owes to the plaintiffs, equitable relief cannot be involved because there is no such thing as an injunction to pay a debt. *U.S. Industries v. An-*

(Continued from previous page)

court of appeals, it is significant to note that on at least two previous occasions the court of appeals has indicated that questions of fact concerning the interpretation of ambiguous settlement agreements are to be resolved by a jury. *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096 (5th Cir. 1981); *Miller v. Baum*, 400 F.2d 176 (5th Cir. 1968).

derson, 579 F.2d 1227, 1230 (10th Cir. 1978).[3] It follows that Green Bay's right to a jury trial should not hinge upon the plaintiffs' erroneous choice of terminology.

II. Green Bay Has Not Waived Its Right to a Jury Trial

Plaintiffs are quite wrong in now arguing that Green Bay has not properly preserved its right to a jury trial. It is probably enough to point out that neither the district court nor the court of appeals found that Green Bay had waived its right to a jury.

Nor could there have been a finding of waiver. Green Bay demanded a jury trial on all issues so triable between Green Bay and any plaintiff that, prior to consolidation of the actions, had actually brought an action against Green Bay. Green Bay's jury demand does not limit the issues as to which Green Bay requested a jury determination; it merely reflects Green Bay's position that it was not obligated to respond to a pleading of any plaintiff who had not formally instituted an action against Green Bay prior to the consolidation order, irrespective of whether that pleading claimed to be a part of the Unified and Consolidated complaint.

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[3]In that case the Tenth Circuit held that use of the extraordinary writ of mandamus was justified. The court said: "If it is a temporary restraining order or an injunction, the order ought to fail as an invalid injunction to pay money with its attendant, but unlawful, possibility of imprisonment for debt. The wisdom of the founding fathers which denied debtors' prisons a place in the American judicial process remains today unimpaired." 579 F.2d at 1229.

In addition, during oral argument before the court of appeals, the panel specifically asked counsel for plaintiffs whether they took the position that Green Bay timely demanded a jury trial. Counsel for the plaintiffs conceded that Green Bay had timely demanded a jury and thereafter consistently reasserted that demand, but then claimed that Green Bay had waived its demand by proceeding with the hearing of December 1982. In rebuttal, Green Bay's counsel directed the panel's attention to the record evidencing the three times during that December hearing that counsel for Green Bay specifically told the district court that a jury must be empanelled to decide the material questions of fact.

Finally, Fed. R. Civ. P. 38 requires that a jury demand be served in the first responsive pleading directed to the issue, but since plaintiffs have not filed any pleadings concerning the ancillary collection action they have been permitted thus far to pursue within the confines of MDL-310, they are in no position to fault Green Bay for the method it was forced to use to bring to the district court's attention its assertion of its right to a jury trial. Moreover, plaintiffs' demanded trial by jury in this action "of all issues triable of right by a jury." Plaintiffs' demand has never been withdrawn and Green Bay is entitled, as a matter of right, to rely on plaintiffs' jury demand as though it were its own. 9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2318 (1971 and 1985 Supp.)

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CONCLUSION

Throughout this litigation the parties, the district court, and the Fifth Circuit have treated the Settlement Agreement as precisely what it is—a contract to pay a debt. No one ever suggested that it was anything more than this until the court below, *sua sponte*, characterized it as a consent decree. Plaintiffs seize eagerly on that characterization and now insist that they are asking for equitable relief in the form of enforcement of a consent decree rather than for a money judgment under a contract of settlement obtained in an action at law. To allow this would undermine fundamental Seventh Amendment principles. Indeed, it is no exaggeration to say that if the ruling of the court of appeals is permitted to stand, equity jurisdiction will, for the first time since *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), be permitted to oust a court of law from jurisdiction over a matter involving a contract to pay a debt where the adequacy of the legal remedy is unchallenged. Such a result would be the first peal of the death knell for this Court's opinions in *Beacon Theatres* and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), and ultimately for the Seventh Amendment itself.

Accordingly, Green Bay respectfully requests that its Petition for Writ of Certiorari be granted and the deci-

sion of the court of appeals be reversed and the cause remanded to the district court for a jury trial.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN
DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. NO. 310

IN RE CORRGUATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO
ALL ACTIONS EXCEPT:

ATLAS CONTAINER CO., INC.
(C.A. No. H-78-916)
CANTRELL AND COCHRANE, INC.
(C.A. NO. H-79-87)
COOK PRODUCE, INC., ET AL.
(C.A. NO. H-78-1387)
DEAN FOOD COMPANY, ET AL.
(C.A. NO. H-78-2004)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. NO. H-78-671)
GREAT NORTHERN PACKAGING CORP., ET AL.
(C.A. NO. H-78-1452)
ITT CONTINENTAL BAKING CO.
(C.A. NO. H-78-376)
METRO MOLDING CORPORATION
(C.A. NO. H-79-1086)
PILLSBURY COMPANY, ET AL.
(C.A. NO. H-79-1044)
ROLLINS CONTAINER, INC.
(C.A. NO. H-79-819)
SUNMARK, INC.
(C.A. NO. H-78-1815)
UNITED FARMERS COOPERATIVE, INC., ET AL.
(C.A. NO. H-77-2158)

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE OF CLAIMS OF PLAINTIFF CONTAINER PURCHASER SUBCLASS AS TO DEFENDANT GREEN BAY PACKAGING, INC.

(Filed January 25, 1980)

WHEREAS, on December 21, 1979 this Court filed its Order and Memorandum Opinion finally approving, in all respects, the settlement with Defendant Green Bay Packaging, Inc. (hereinafter the "Settling Defendant"), which Order and Memorandum Opinion constitutes its findings of fact and conclusions of law with respect to this final judgment and this final judgment is entered thereon, and

WHEREAS, each of the conditions and events required by said settlement with Settling Defendant to be satisfied or occur prior to the entry of this final judgment has been satisfied or has occurred.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Due and adequate notice was directed to all those persons who are members of the Plaintiff Container Purchaser Subclass, as hereinafter defined, and certain other persons, notifying said persons, among other matters, of the pendency of these actions as class actions, of their right to be excluded from the Plaintiff Container Purchaser Subclass, and of said settlement with Settling Defendant which this Court has finally approved. The giving of said notice was the best notice practicable under the circumstances, and included individual notice to all members of the Plaintiff Purchaser Subclass who could be identified through reasonable effort. The giving of said notice fully complied in every respect with the re-

quirements of Rule 23 of the Federal Rules of Civil Procedure and said settlement with Settling Defendant.

2. Pursuant to Rule 23 of the Federal Rules of Civil Procedure and said settlement with Settling Defendant, this Court hereby dismisses, with prejudice and without costs, all claims of the members of the Plaintiff Container Purchaser Subclass, as hereinafter defined, except the individual claims of any named plaintiff or other member of the Plaintiff Container Purchaser Subclass who is specified in paragraph 4 below as having duly requested exclusion from the Plaintiff Container Purchaser Subclass, against Settling Defendant only, arising under the antitrust laws of the United States or of any state or other jurisdiction, or any similar statutory or common law, which have been, might have been, are now or could be asserted in these actions in connection with corrugated containers and corrugated sheets or which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or corrugated sheets alleged in the Unified and Consolidated Complaint, as amended, on file herein. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court hereby expressly determines that there is no just reason for delay and hereby expressly directs the entry of this judgment of dismissal with prejudice as a final judgment.

3. The term "Plaintiff Container Purchaser Subclass" is defined herein to consist of the following persons:

> All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers, as defined in the Unified and Consolidated Complaint on

> file herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960 to January 25, 1978, except for the members of the Sheet Plant Subclass, as defined and established by this Court's Pretrial Order No. 7, dated December 26, 1978.

The term "Plaintiff Container Purchaser Subclass" also includes the Settlement Class as established pursuant to said settlement with the Settling Defendant. This Court hereby finds and determines that all such persons who have not duly requested to be excluded from the Plaintiff Container Purchaser Subclass are members of the Plaintiff Container Purchaser Subclass.

4. The following persons, and no others, have duly requested to be excluded from the Plaintiff Container Purchaser Subclass, and accordingly are not included in or bound by this final judgment:

> Those persons included on the Amended Opt-Out List of Class Members, filed November 20, 1979 (this Court's Docket No. 1099), except for Jays Food, Inc., which was permitted to withdraw its exclusion by this Court in its Order made January 8, 1980.

5. Without affecting the finality of this judgment in any way, this Court hereby retains continuing jurisdiction over the Plaintiff Container Purchaser Subclass and the Settling Defendant with respect to discovery disputes, as provided in said settlement with Settling Defendant, and this Court hereby retains continuing jurisdiction over the settlement Fund described in said settlement, for the purpose of effectuating the settlement and for the purpose of directing the disposition of the settlement Fund in accordance with the terms of the settlement, including:

(a) Allocating and distributing the settlement Fund among various members of the Plaintiff Container Purchaser Subclass and among other persons and entities; and

(b) Allowing or disallowing applications for attorneys' fees, costs and expenses, and paying any attorneys' fees, costs and expenses allowed by this Court.

6. Nothing in this final judgment shall be deemed to preclude this court from determining hereafter that any person specified in Paragraph 4 above as having duly requested exclusion may be permitted to withdraw their exclusion from and become a member of the Plaintiff Container Purchaser Subclass, which includes the Settlement Class as established pursuant to said settlement with the Settling Defendant and be deemed to be included in and bound by this final judgment dismissing with prejudice the claims described above against the Settling Defendant.

DATED:

/s/ John V. Singleton
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO
ALL CLASS ACTIONS EXCEPT:

FRANKLIN CONTAINER CORP., ET AL,
C.A. NO. H-78-671

AGREEMENT OF SETTLEMENT BETWEEN
CONTAINER PURCHASER AND
SHEET PLANT SUBCLASSES AND
DEFENDANT ALTON BOX BOARD COMPANY

WHEREAS, certain plaintiffs are prosecuting M.D.L. No. 310 now pending before the above-entitled Court (hereinafter "the Court") as a class action;

WHEREAS, the Court ruled in its Order filed on September 6, 1978, that these actions may proceed as a class action on behalf of the class as defined in said Order (hereinafter "the Certified Class");

WHEREAS, the Court ruled in paragraph 4 of Pretrial Order No. 7, filed on December 26, 1978, that the Certified Class shall consist of a Sheet Plant sub-class, as defined in said Order of December 26, 1978, and a Container Purchaser sub-class comprised of the remainder of the members of the Certified Class;

WHEREAS, plaintiffs have alleged that defendant Alton Box Board Company (hereinafter along with all past and present subsidiaries and affiliates, referred to as "Settling Defendant") was a participant in an unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers and sheets and Settling Defendant has denied the material allegations of plaintiffs' complaint and raised certain affirmative defenses thereto;

WHEREAS, Settling Defendant, denying wrongdoing of any kind whatsoever, has nevertheless agreed to enter into this Agreement of Settlement to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

WHEREAS, plaintiffs have conducted investigations into the facts of these cases, reviewed at length and analyzed the grand jury documents produced by the defendants, the government trial exhibits made available to plaintiffs, the testimony at trial of the companion criminal cases, certain grand jury and government interview transcripts produced by the government, have conducted formal and informal investigations, including document and deposition discovery regarding the claims of the plaintiffs, and have presented at trial much of their case in chief against Settling Defendant;

WHEREAS, plaintiffs have conducted an investigation into the corporate financial records and the financial condition of Settling Defendant with the assistance of Price Waterhouse & Co.;

WHEREAS, plaintiffs have concluded that a settlement with Settling Defendant in the amount and on the terms hereafter set forth is in the best interests of plaintiffs and the Container Purchaser and Sheet Plant subclasses;

— NOW, THEREFORE, it is agreed by and among the undersigned that these class actions be settled and compromised with Settling Defendant, upon approval by the Court, after a hearing as provided for herein, and with plaintiffs expressly retaining their rights against non-settling defendants, on the following terms and conditions:

1. The undersigned counsel represent that they are fully authorized to enter into the terms and conditions of, and execute, this Agreement.

2. The undersigned agree to undertake their best efforts, including all steps and efforts contemplated by this Agreement, and any other steps and efforts which may become necessary by order of the Court or otherwise, to effectuate this Agreement and the settlement set forth herein.

3. Subject to the Court's approval and for the purposes of this Agreement only, the undersigned agree that there shall be designated the following Settlement Class in M.D.L. 310:

> All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint on file herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period of January 1, 1960, to January 25, 1978, except for the following persons who are not included in said Settlement Class:
>
> > Those persons included on the Amended Opt-out List of Class Members, filed November 20, 1979 (the Court's Docket No. 1099), other than those

persons who have been permitted by the Court to withdraw their requests for exclusion and to be included in the Certified Class.

For the purposes of this Agreement, said Settlement Class shall consist of the following sub-classes:

(a) A Container Purchaser sub-class which shall be identical to the Container Purchaser sub-class as defined and established by the Court in its Pretrial Order No. 7, dated December 26, 1978; and

(b) A Sheet Plant sub-class which shall be identical to the Sheet Plant sub-class as defined and established by the Court in said Order.

4. Said Settlement Class shall be represented by the class representatives designated by the Court in its Order dated October 26, 1978, as modified by the Court's Pretrial Order No. 7, dated December 26, 1978, or as may be otherwise ordered by the Court, who have entered into this Agreement.

5. In full and complete settlement of the claims asserted in M.D.L. 310 by the members of the Settlement Class against Settling Defendant and subject to the remaining provisions hereof, Settling Defendant shall pay Five Million Four Hundred Thousand ($5,400,000.00) Dollars, in the manner described hereinafter. In addition Settling Defendant agrees that the Court shall forthwith enter a Consent Decree in the form annexed hereto as Exhibit A. Within five days after the execution of this Agreement, Settling Defendant shall deposit, in escrow, as described hereinafter, One Million Six Hundred Thousand ($1,600,000.00) Dollars; one year from the date of execution of this Settlement Agreement, Settling Defendant shall deposit an additional One Million Nine Hundred Thousand ($1,900,000.00) Dollars into escrow, and two

years from the date of execution of this Settlement Agreement, Settling Defendant shall pay an additional One Million Nine Hundred Thousand ($1,900,000.00) Dollars into escrow. The deferred payments shall be guaranteed by a letter or letters of credit in a form satisfactory to plaintiffs' counsel and issued by a bank or banks satisfactory to plaintiffs' counsel. Such letters of credit shall be deposited within 30 days of the execution of this agreement, such deposit being a material condition of this agreement. Said amount and the interest thereon shall be referred to hereinafter as the "Fun". Settling Defendant further agrees that the Court may from time to time, subsequent to preliminary approval of this settlement, order that amounts not to exceed Nine Hundred Twenty Thousand Dollars ($920,000.00) in the aggregate shall be paid out of the Fund to be used for the payment of costs and expenses (excluding the payment of any attorneys' fees) incurred or which may be incurred in connection with the prosecution of this litigation or in connection with the giving of notice to the members of the class, or in administration or distribution of this or other class action settlements or judgments in M.D.L. 310. To the extent that any portion of the $920,-00.00 is so paid out, the amount paid out shall not be refundable to Settling Defendant in the event the settlement set forth in this Agreement is finally disapproved. Except as otherwise expressly provided herein, Settling Defendant shall not be liable for any costs or attorneys' fees, but all such costs and attorneys' fees as approved by the Court shall be paid out of the Fund. In no event shall Settling Defendant be under any obligation to deposit monies in excess of Five Million Four Hundred Thousand ($5,400,-000.00) Dollars in connection with this Agreement. In the event federal income tax liability is finally assessed

against and paid by Settling Defendant as a result of income earned in the Fund, Settling Defendant shall be entitled to reimbursement of such payment from the Fund. Settling Defendant will use its best efforts to resist any such assessment or payment.

6. The Fund shall be invested pursuant to the Escrow Agreement attached as Exhibit B hereto and made a part hereof. Any interest earned on the Fund shall become and remain a part thereof. Settling Defendant, from time to time, shall receive reports covering the status of the fund. The escrow agent and plaintiffs will be reimbursed and indemnified out of the Fund for all costs and expenses incurred in the administration and distribution of the Fund. Disbursements for such costs and expenses shall be made from time to time upon the approval of the Court. Settling Defendant shall have no responsibility with respect to the allocation, administration, or distribution of the Fund, except as expressly provided herein.

7. Except as provided in paragraph 5 of this Agreement, no distribution of the Fund shall be made unless and until all of the following conditions precedent are met; (i) the Court has finally approved this Agreement and the settlement set forth herein pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, (ii) the entry of the Court's final judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice the claims of the Settlement Class members against Settling Defendant, (iii) the final affirmance on appeal of, or the final dismissal of an appeal from or the expiration (without the filing or noticing of an appeal) of the time to appeal from said final judgment, and (iv) an order of the Court allowing such dis-

tribution. Subject to the foregoing, (a) distributions from the Fund approved by the Court may be made to pay approved costs and expenses, past and future, incurred by plaintiffs or their counsel in these M.D.L. proceedings, (b) such distribution may be made from time to time on an interim basis prior to the time when the remaining balance of the Fund may be distributed to Settlement Class members, and (c) all such interim distributions shall be paid from the Fund only if authorized or approved by and upon the application of the Plaintiffs' Steering Committee and upon approval of the Court.

8. Upon the Court's approval of this Agreement and the settlement set forth herein, pursuant to said Rule 23(e), said final judgment shall be entered which shall provide that all claims of the Settlement Class as against Settling Defendant arising under the antitrust laws of the United States or of any state or other jurisdiction, or any similar statutory or common law, which have been, might have been, are now or could be asserted in these actions in connection with corrugated containers and corrugated sheets, or which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or corrugated sheets alleged in the Unified and Consolidated Complaint on file herein, or any amendments thereto, shall be dismissed with prejudice.

9. The settlement set forth in this Agreement shall not become effective unless and until this Agreement is finally approved in all respects by the Court (including the approval of the Settlement Class, as defined in paragraph 3 hereof). In the event that the Court refuses to approve this Agreement or any material part of it, or in

the event that the conditions precedent for distribution under paragraph 7 are not satisfied, this entire Agreement shall become null and void unless all parties promptly agree to proceed with the settlement as and if modified by the Court. In the event this Agreement becomes null and void for any reason, the Fund, including interest thereon, shall be disbursed promptly to Settling Defendant, except that any funds actually expended or expenses incurred as outlined in paragraph 5 above shall not be refundable to Settling Defendant, and except that any costs of administering the Fund or the settlement set forth in this Agreement, exclusive of attorneys' fees, shall first be deducted before the Fund is returned to Settling Defendant. It is expressly understood and agreed that this Settlement Agreement shall remain in full force and effect as to the Settlement Class set forth herein notwithstanding any revocation or modification by any court of the Court's September 6, 1978, Class Certification Order, or paragraph 4 of the Court's December 26, 1978, Pretrial Order No. 7 with respect to the propriety of class certification for litigation purposes.

10. The fact of this settlement with Settling Defendant shall not be construed to affect, in any manner whatsoever, any joint or several liability of any of the non-settling defendants for the conspiracy and their acts alleged in the complaint, indlucing (sic) but not limited to, any acts of Settling Defendant, any putative common law rule or practice, or any federal, state or local statute or Court decision to the contrary notwithstanding. Claimants upon the Fund prior to participation therein will execute and deliver covenants not to sue Settling Defendant, or any of its present or former officers, direc-

tors, or employees, under the antitrust laws of the United States or of any state or other jurisdiction or any similar statutory or common law, asserting claims which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or sheets alleged in the Unified and Consolidated Complaint on file herein, as amended, or otherwise raised, on the checks or claim forms.

11(a). Settling Defendant agrees that it will take no actions to hinder or impede plaintiffs during the remainder of the present trial of this class action; and that upon the execution of this agreement it will take no further steps or actions in furtherance of any cooperative or joint defense effort during the remainder of the trial, or upon any appeal of the outcome of this trial or retrial other than necessary for an orderly transition of joint defense efforts to date.

(b) Settling Defendant will, upon request by plaintiffs, produce any documents, information or any current employee who was listed on Settling Defendant's Trial Witness List to appear at informal conferences or consultations or as a witness at trial without requirement of subpoena, unless, for reasons beyond its control, Settling Defendant cannot produce such documents, information or witnesses. In such case, Settling Defendant will advise plaintiffs' trial counsel in writing within two (2) days after the request is made. Plaintiffs will limit their requests to production of documents, information and current employees for the sole purpose of rebutting any part of the defense presented by the remaining non-settling defendants at the trial of this matter, and only to the extent that the defense is related to matters per-

taining specifically to Settling Defendant. Nothing in this paragraph 11(b) shall require Settling Defendant or its counsel to breach any privilege belonging to Settling Defendant and non-settling defendants or others which arose by reason of any joint defense agreements or efforts. Notwithstanding the foregoing, Settling Defendant shall not be required to produce any such employee as a witness at trial who advises Settling Defendant that he intends to invoke his rights under the Fifth Amendment to the Constitution of the United States. In that event, such employee shall be produced for deposition by telephone or otherwise, at the request of plaintiffs.

12. This Agreement does not prejudice the rights of Settling Defendant or any subsidiary, affiliate or division of Settling Defendant acquired on or after December 26, 1978, who might otherwise be members of any class created in M.D.L. 310, including the Settlement Class designated in paragraph 3 hereof to participate as members of any such class.

13. Entry of the Consent Decree in the form annexed to this Agreement as Exhibit "A" should not be made until (i) the Court has approved this Agreement and the settlement set forth pursuant to Rule 23(e), Federal Rules of Civil Procedure, and (ii) the entry of the Court's final judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice claims of the Settlement Class members against Settling Defendant.

14. This Agreement may be executed in counterpart by the parties hereto and shall become effective upon its execution by the undersigned counsel as of the 11th day of July, 1980.

MANDELL & WRIGHT
Stephen D. Susman, Chairman
Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002

McGOVERN, OPPERMAN & PAQUIN
Vance K. Opperman, Vice Chairman
Plaintiffs' Steering Committee
1100 National City Bank Building
Minneapolis, Minnesota 55402

By: /s/ Stephen D. Susman

On Behalf of Plaintiffs' Steering Committee (except James Sloan and Granvil Specks) and All Designated Class Representatives of the Container Purchaser Sub-Class (except Ilikon Corporation)

BERGER & MONTAGUE, P.C.
H. Laddie Montague
1622 Locust Street
Philadelphia, Pennsylvania 19103

MAUN, GREEN, HAYES, SIMON,
MURRAY AND JOHANNESON
Lawrence J. Hayes
332 Hamm Building
St. Paul, Minnesota 55155

By: .....

On Behalf of All Designated Class Representatives of the Sheet Plant Sub-Class (except Great Northern Packaging Corp.)

HOAGLAND, MAUCKER, BERNARD &
ALMETER
Karl K. Hoagland, Jr.
Robert B. Maucker
401 Alton Street
Alton, Illinois 62002

Cox & Smith, Inc.
J. Burleson Smith
Keith E. Kaiser
600 National Bank of Commerce Bldg.
San Antonio, Texas 78205

By: .....

On Behalf of Defendant
Alton Box Board Company

Exhibit "B"

IN THE DISTRICT COURT OF
THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. NO. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO
ALL CLASS ACTIONS EXCEPT:

FRANKLIN CONTAINER CORP., ET AL.
(C.A. NO. H-78-671)

CONSENT DECREE

WHEREAS, plaintiff Atlas Container filed its complaint herein on February 1, 1978, plaintiffs Great Northern Packaging Corp. and Huron Packaging Corp. filed their complaint on October 25, 1978, and plaintiff Rollins Container, Inc. filed its complaint herein on February 20, 1979, and

WHEREAS, each of the aforesaid plaintiffs (the "Settling Plaintiffs") filed on its own behalf and on behalf of a class as defined in the respective complaints; and

WHEREAS, the Court certified, on September 6, 1978, a class consisting of all persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendants, at any time during tme period from January 1, 1960 to January 25, 1978, and the Court on December 26, 1978, certified two subclasses thereof including a Sheet Plant Subclass consisting of all Sheet Plants (as defined in the Court's Order of December 26, 1978) which purchased corrugated sheets in the United States during the period January 1, 1960, to January 25, 1978; and

WHEREAS, Rollins Container, Inc. was named as third representative of the Sheet Plant Subclass pursuant to Pretrial Order No. 16 dated June 8, 1979; and

WHEREAS, the above-named plaintiffs (or a majority of them), as representatives of the Sheet Plant Subclass, and the undersigned defendant (hereinafter referred to as "Settling Defendant"), a defendant in one or more of these three actions, by its respective attorneys, have agreed to entry of this Consent Decree without admission of any liability and without trial or adjudiciation of any issue of fact or law in the above proceedings, and without this Consent Decree constituting evidence or any admission by any party signatory hereto with respect to any such issue, and

WHEREAS, the Consent Decree and the injunction ordered and granted herein, pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, constitutes an integral part of the Settlement Agreement, dated ———,

of the above actions entered into by Settling Defendant and the Settling Plaintiffs, acting as representatives of the Sheet Plant Subclass;

NOW, THEREFORE, following appropriate research, investigation, inquiry and negotiations, but without trial or adjudication of any issue of fact or law in the above proceeding, and upon the consent of the signatory parties and with the approval of this Court pursuant to Rule 23 of the Federal Rules of Civil Procedure, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction of the subject matter of this action and of each of the parties to this Consent Decree.

II.

DEFINITIONS

A. "Corrugated sheets" consist of linerboard (a flat paper product manufactured in mills and sold in rolls) and medium (a paper product manufactured in mills and sold in rolls), glued together in layers in which the fluted medium is between the two or more layers of linerboard.

B. "Corrugated containers" are containers made of corrugated sheets.

C. A "sheet plant" is defined as a person (excluding present defendants in MDL 310 and all subsidiaries and affiliates of such defendants) who (a) purchased cor-

rugated sheets, (b) manufactured and sold corrugated containers and/or corrugated fillers, pads and partitions which were sold for use in or with corrugated containers, and (c) did not manufacture corrugated sheets.

III.

APPLICABILITY AND NOTICE

Within thirty (30) days after the effective date of this Consent Decree, Settling Defendant is ordered and directed to deliver a copy of the Consent Decree to each of its officers and regional managers, plant managers and sales managers, whose product responsibility includes corrugated sheets or corrugated containers, and thereupon file an affidavit with the Clerk of the Court, with a copy thereof to the attorneys for the class, that is has done so, which affidavit shall set forth the name of each person so served.

The effective date of this consent decree is defined in Section VIII, *infra*.

IV.

PRICE FIXING-PREDATORY PRICING

Settling Defendant is enjoined and restrained from directly or indirectly entering into, adhering to, enforcing, furthering, or maintaining any unlawful combination, conspiracy, agreement, or understanding with any other manufacturer or seller of corrugated containers or corrugated sheets to:

(a) Fix, depress, raise, stabilize or otherwise maintain prices, or to exchange prices, or price formulae, or other terms of conditions of and for the sale of corru-

gated sheets to any member of members of the Sheet Plant Subclass;

(b) Divide, allocate, or otherwise apportion customers which are members of the Sheet Plant Subclass or markets composed of such customers with respect to corrugated sheets;

(c) Refrain from soliciting the business of or refrain from dealing with, any customer or potential customer for corrugated sheets which is a member of the Sheet Plant Subclass;

(3) Engage in a practice of predatory pricing with respect to corrugated sheets in relation to corrugated containers or corrugated containers in relation to corrugated sheets, including, but not limited to, a price squeeze affecting members of the Sheet Plant Subclass.

V.

MONOPOLIZATION — PREDATORY PRICING

Settling Defendant is enjoined and restrained from monopoliizng, conspiring to monopolize, or attempting to monopolize any relevant geographic market for corrugated containers or corrugated sheets in violation of the federal antitrust laws by engaging in a practice of predatory pricing with respect to corrugated sheets in relation to corrugated containers or corrugated containers in relation to corrugated sheets.

VI.

RECORD RETENTION

A. For the purpose of assuring and securing compliance with this Consent Decree, Settling Defendant shall

retain during the period of this Consent Decree such books and records, including, but not limited to, correspondence and memoranda, maintained in the usual and ordinary conduct of its corrugated sheet and corrugated container business as may be necessary to determine costs, prices, profits, transactional data, and expense accounts for the persons described in Section III, *supra*.

B. In the event that any Settling Plaintiff or any member of the Sheet Plant Subclass has reasonable cause to believe that the terms and conditions of this Decree may not have been complied with by any plant or plants of Settling Defendant, then such Settling Plaintiff or member of the Sheet Plant Subclass may petition this Court, on a showing of such reasonable cause, for an Order directing such Settling Defendant to show cause why Settling Defendant should not be required to produce all books and records of such plant or plants of such Settling Defendant relevant to such alleged non-compliance with the terms and conditions of this Decree, subject to the entry of an appropriate protective order.

C. No information obtained by the means provided in Subparagraph B of this Section shall be divulged to any person or used for any purpose other than in the course of legal proceedings for the purpose of securing compliance with this Consent Decree, or as otherwise required by law.

VII.

RETENTION OF JURISDICTION

Until the termination of this Consent Decree, jurisdiction is retained by this Court for the purpose of enabling

any of the parties to this Consent Decree to apply to this Court at any time for such further order and directions as may be necessary or appropriate for the construction, implementation, or carrying out of this Consent Decree, for the enforcement of compliance therewith, and for the punishment of any violation.

VIII.

EFFECTIVE DATE OF DECREE

This Consent Decree shall become effective upon approval by the District Court in the above-captioned actions in accordance with and as provided in the Settlement Agreement executed and delivered by the parties concurrently herewith. Any appeal thereof will not delay the effective date of this Consent Decree. This Consent Decree shall, subject to the terms of the Settlement Agreement, remain in effect until January 31, 1984, at which time it shall terminate.

IX.

CONSTRUCTION, INTERPRETATION AND ENFORCEMENT OF THIS DECREE

A. This Consent Decree shall be construed, interpreted and enforced so as to carry out its principal purpose of protecting competition.

B. Nothing contained in this Consent Decree shall be construed to prohibit conduct lawful under the antitrust laws, including the Sherman Act, the Clayton Act and the Robinson-Patman Act, nor shall anything in this Consent Decree be construed to authorize conduct prohibited by such antitrust laws.

X.

AMENDMENTS

This Decree may be amended in writing but only upon consent of the attorneys for the Sheet Plant Subclass (or a majority of them) and counsel for the settling defendant with the approval of the Court, with notice to all Subclass representatives, but without further notice to members of the Sheet Plant Subclass, unless otherwise directed by this Court.

DATED:

Representatives of the Sheet Plant Subclass

ROLLINS CONTAINERS, INC.

By: _____
Its Attorney

ATLAS CONTAINER

By: _____
Its Attorney

ALTON BOX BOARD COMPANY

BY: _____

ORDERED, ADJUDGED AND DECREED ON _____, 1980.

_____
Judge of the District Court